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Supreme Court of the United States

October Term, 1926

No. 88

MALCOLM E. NICHOLS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, PLAINTIFF IN ERROR

vs.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, EXECUTORS OF THE WILL OF JULIA COOLIDGE

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF ACCOMPANYING MOTION

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

And now come the undersigned and say that they are of counsel of record in a suit now pending in the District Court of the United States for the District of Massachusetts; namely, Arthur D. Hill, surviving Executor of the will of Peter C. Brooks *vs.* Malcolm E. Nichols, Collector of Internal Revenue of the United States for the District of Massachusetts; that said suit of Hill, Executor *vs.* Nichols is one to recover an additional estate tax paid by the plaintiff to the defendant of $1,166,617.27 and that said suit of Hill, Executor *vs.* Nichols involves in most respects the same questions as are involved in the above entitled cause of Nichols *vs.* Coolidge, and particularly involves the question of whether or not that part of the estate tax contained in the Revenue Act of February 24, 1919, is constitutional which includes in the value of the gross estate of a decedent the value of a trust estate created before the passage of that Act.

WHEREFORE the undersigned respectfully move that they be granted leave to file the accompanying brief as *amici curiae*.

Arthur D. Hill.
Richard H. Wiswall.

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BRIEF OF ARTHUR D. HILL AND RICHARD H. WISWALL, AMICI CURIAE

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THE OPINION OF THE COURT BELOW

The opinion of the court below, the District Court for the District of Massachusetts, was delivered in the form of a charge to the Jury and is reported in *Coolidge* v. *Nichols*, 4 F. (2d) 112. R. pp. 19–28.

JURISDICTION OF THIS COURT

1. Date of Judgment to be reviewed April 3, 1925. R. 7, 8. Writ of error allowed on same day. R. 28.

2. The ruling made by the lower court which is the basis of this court's jurisdiction is that the Act of February 24, 1919, 40 Stat. 1057, commonly called the Revenue Act of 1918, as applied to the trust created by Julia Coolidge is void because not an exercise of any power granted to Congress by the Constitution of the United States. R. 27.

3. The Statute giving this court jurisdiction by writ of error to the judgment of the District Court is Judicial Code, sec. 238 as amended by Act of January 28, 1915, sec. 2, 38 Stat. 803. The Act of February 13, 1925, taking away the jurisdiction, did not become effective till May 13, 1925 and cases like that at bar were expressly saved. Sec. 14; 43 Stat. 936, 938, 942.

4. In *Lewellyn* v. *Frick*, 268 U. S. 238, the jurisdiction of this court was the same as in the case at bar.

STATEMENT OF THE CASE

Julia Coolidge, July 29, 1907, joined with her husband in transferring by an instrument in writing certain real and personal property to trustees, and on the same day those trustees executed a declaration of trust respecting the property so conveyed. R. 19. The declaration is set out in the Record pp. 9 to 11. In substance the declaration of trust gave the trustees full power of management and provided that the *net* income therefrom should be payable 3–7 to Julia Coolidge and 4–7 to her husband, J. Randolph Coolidge

> "so long as they both live, and to pay the whole of said net income to the survivor and upon the death of the survivor to distribute equally the trust property among the following persons who are children of said J. Randolph Coolidge and Julia Coolidge, viz.: J. Randolph Coolidge, Jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge, and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be

> entitled to take his intestate property under the statute of distributions in effect at the time of the death of said survivor, provided that in no case shall a surviving widow take as distributee more than one-half of said share." Record pp. 19–20.

On April 6, 1917, Mrs. Coolidge and her husband by writing transferred to their five sons, in equal shares, all their interests in the trust that had been established, and all their right to receive income therefrom, including additions thereto and any accrued income which had not already been paid over to them, and by the same writing requested the trustees to pay the income from the trust to those five sons in accordance with the written assignment. Record p. 20.

On May 18, 1917, Mrs. Coolidge conveyed to the five sons two parcels of real estate in Massachusetts taking back a lease for the term of one year at a rent of one dollar with the privilege of renewing the same from year to year unless written notice should be given by either the lessor or the lessee at least a month before the end of the original term or any renewal thereof. The conveyance of these two parcels of real estate was not made for any consideration. Record p. 20.

Mrs. Coolidge died January 6, 1921. R. 21. The defendants in error are executors of her will and paid an estate tax upon a net estate of over $100,000. R. 21. The Commissioner of Internal Revenue increased the gross estate by adding thereto $432,155.35, the value as of the date of the death of Julia Coolidge of that part of the trust property which she had conveyed in trust, the actual property composing the trust having, by change of investment, become materially different from that original transfer by Mrs. Coolidge. R. 21. The Commissioner of Internal Revenue also included in the gross estate the value of the real estate conveyed by Mrs. Coolidge to her sons on May 18, 1917. R. 21. This action of the Commissioner of Internal Revenue imposed an additional tax upon Mrs. Coolidge's estate of $36,799.38 for which sum, with interest, judgment was rendered for Mrs. Coolidge's executors, the defendants in error, by the court below, R. 8. The trial judge ruled, R. 28, (see ruling 6, requested by the Collector of Internal Revenue R. 17) that the trust created by Mrs. Coolidge in her lifetime was intended to take effect in possession or enjoyment at or after her death, and that the value of the interest with respect to which she created such trust was, under the terms of the Revenue Act of 1918, Section 402 (c), included as a part of her gross estate, R. 24–25; and further ruled that so construed the Revenue Act of 1918, Section 402 (c) was void under the Constitution of the United States as applied to the trust

created by Mrs. Coolidge. R. 27. The court, as requested by the plaintiffs below, R. 17, 18, 27, ruled that Congress had been granted no power by the Constitution to enact the provision of the Revenue Act of 1918 which applied to Mrs. Coolidge's trust, that the tax before the court was repugnant to the fourth clause of Section 9 of Article I of the Constitution as a direct tax, and that the estate tax of the Revenue Act of 1918 so applied to Mrs. Coolidge's trust was repugnant to the Fifth Amendment of the Constitution of the United States. Judgment having been entered for Mrs. Coolidge's executors, a bill of exceptions was allowed April 3, 1925, R. 28, and a writ of error allowed the same day. R. 28. By his assignments of error the Collector of Internal Revenue raises the question of whether the court was right in its rulings with respect to the constitutionality of the estate tax of the Revenue Act of 1918, and whether the court was in error in eliminating from the gross estate of Mrs. Coolidge the parcels of real estate conveyed by her to her sons May 18, 1917. R. 29.

This brief filed by the undersigned as *amici curiae* is directed to the constitutionality of the Revenue Act of 1918 as applied to trusts created before its passage, and to a possible construction of the Act by which the question of its constitutionality may be avoided.

SUMMARY OF ARGUMENT

1. As construed by the court below R. 24-28, the estate tax of the Revenue Act of 1918 is, as applied to trusts created prior to its enactment and intended to take effect in possession or enjoyment at or after the death of the creator of the trust, unconstitutional for the following reasons:

(a) The tax is not really a duty, impost or excise within the first power granted Congress in Section 8, Article I of the Constitution of the United States.

(b) If a tax at all the estate tax as applied to Mrs. Coolidge's trust is a direct tax requiring apportionment under the Constitution.

2. In view of the foregoing considerations the court may well construe the estate tax in the Revenue Act of 1918 as not applying to any trust created before its passage when the creator of the trust parted at that time with the entire interest in the property transferred by him, whether or not the trust provided for estates limited on his death.

PART FIRST

The constitutionality of the Estate Tax as applied to trusts created prior to the 1918 Act and intended to take effect in possession or enjoyment at or after the death of the creator of the trust.

PRELIMINARY CONSIDERATIONS

Long before the World War and before Congress has considered imposing any taxes on property passing from one person to another by reason of death, an owner of property creates a trust, the income of which he is to have for his life, and the principal of which on his death, another is to receive.

Congress, in 1919, many years after the creation of this trust, passes an act imposing a tax "upon the transfer of the net estate of every decedent dying after" its enactment. *Y. M. C. A. v. Davis*, 264 U. S. 47. The man who made the trust then dies. Assume that the act is construed as saying that

> (1) the net estate transferred shall consist of what the man leaves behind him plus the trust property at its value when the man dies. Sec. 402c. (The act says that the trust property is to be included in the gross estate but, of course, that includes it in the net.)
>
> (2) the rate of tax shall depend on the sum of the items composing the net estate, Sec. 401.
>
> (3) the tax shall be paid by the man's executor or administrator, if he has any funds to pay it with. Sec. 407.
>
> (4) if the executor or administrator does not or cannot pay the tax, the trustee of the trust is personally liable therefor. Sec. 409.

And that the result of the combination of (1), (2), (3), and (4) is that there may or may not be a tax on the property in the trust depending on whether or not its creator survives the enactment of the statute and on whether or not his executor or administrator has any or sufficient funds to meet the tax; and that if the executor or administrator has funds the rate at which he pays depends on what funds he has and what the trust is worth.

The question then arises as to whether such a transfer tax, where the value of such a trust is laid hold of for the purpose of determining what an executor primarily or a trustee secondarily shall pay to the government, is within the powers granted Congress by the Constitution.

ARGUMENT

Of course, the tax must be sustained as a duty, impost or excise, if at all. Constitution, Article 1, sec. 8, clause 1. Of course, also, if it is in reality a duty, impost or excise, and is uniform throughout the United States, it is within the granted powers and does not violate the Fifth Amendment. The question therefore is: Can this exaction from an executor, or if his pockets are empty, from a trustee, be deemed really a tax on what Congress says it is taxing, namely, "The transfer of the net estate of" a decedent or is it an effort of Congress to take property, the transfer of which originally it conceivably might have taxed, which is not part of the net estate of a decedent at all. In other words is the taxing of the property of a trust, of the character just described and created before the taxing act was passed, an impost "naturally and reasonably adapted to the collection of a tax" on the transfer of the net estate of a decedent "*dying after the enactment*" of the law? See *Child Labor Tax Case*, 259 U. S. 20 at p. 43.

If it is not, it is either a direct tax which must be apportioned or an exaction which can in no way be deemed a tax.

WHAT IS THE "NET ESTATE OF A DECEDENT"?

A layman would say, in answer to the foregoing question, that it is what remains of the property of a dead man after paying his debts and all administration expenses. If pressed a lawyer might or might not include in the estate property over which the deceased had exercised a general power of appointment and if consulted by a creditor, the lawyer might look round to see if the deceased had made any voluntary conveyances for the purpose of avoiding the payment of his bills.

No layman or lawyer would or could include in the estate of a deceased person property which the decedent, when free of debt, years before his death, transferred to trustees for his own benefit for life with remainders over. Can Congress for purposes of taxation include in the net estate of a decedent property which neither the common law, nor the ecclesiastical law as far as we are aware, nor the statute law has ever made subject to the claims of creditors of the deceased.

What is the situation before Congress?

The country needs money and Congress must find new objects of taxation. It proposes to tax the "net estates" of persons who may die after Congress has acted. Of course, when Congress has acted, many souls will seek a means to escape from this world with their property untaxed. Congress must so see to it with respect to persons dying after the act passes that such

an escape is impossible. This Congress does in two or perhaps three ways. *First:* It includes in the estate property given away in the future "in contemplation of death," *i.e.* with death directly in view. *Second:* It includes in the estate future transfers in trust in which the settlor of the trust controls the devolution of property after his death. Property of these two classes must be included in the net estate or escape from the estate tax will be easy. The inclusion of these classes is a precaution "naturally and reasonably adapted to the collection of the tax." *Third:* It may include the exercise of general powers on the basis that a general power is practically the equivalent of ownership.

To put the foregoing paragraph in another way. An estate tax law must prevent conveyances in fraud, so to speak, of the tax law, just as the common law prevents a debtor by conveyances escaping his just debts. See the discussion in *Keeney* v. *New York*, 222 U. S. 525, 535, 536; and also *Carter* v. *Craig*, 77 N. H. 200.

But conveyances in trust, no matter what the limitations, made before the passage of the estate tax law, were not made, leaving state laws as we must out of consideration, with any estate or succession tax in mind. They were effected for any number of prudential reasons, as for example, ridding the makers of the care of property or the fear of becoming mentally incapable. They were not created for the purpose of and had no substantial relation to escaping the incidence of federal estate taxation. By their very terms they ceased to be a part of the estate of those creating them. Certainly they formed no part of the estates of those who died *before* the passage of the Act of 1918. The conclusion, accordingly, is irresistible, that Congress inserted in the Revenue Act of 1918 the clauses with respect to transfers and trusts made or created before the passage of the act for the simple purpose of getting some more money into the Treasury. The resulting revenues were not really estate taxes at all but, if not direct taxes, exactions on past transactions having no natural relation whatever to the successful imposition of estate taxes on the property of those who happened to survive the passage of the Act of 1918. All this is carefully pointed out by Brewster J. in *Coolidge* v. *Nichols*, 4 Fed. (2d) 112 at pp. 116–117.

And it is important to note the language of Section 402 which declares:

> "If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for a

fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax."

This language makes it clear that the tax is conceived by Congress not as one on the transfer of the true net estate measured, in part, by the trust but as a tax "in respect" to the trust itself upon which, under certain circumstances, the government has a lien. In other words, under certain circumstances, there is a tax imposed directly on the trust. The tax is so evidently a direct tax on property that the draughtsman unwittingly says so. Even without the express language of section 409, the effect of the statute is, if the executor does not pay the tax, to tax the trust. This is made plain by *Frick* v. *Pennsylvania*, 268 U. S. 473, 494–495.

Can a state by statute subject to the payment of the debts of a deceased a trust created prior to the passage of the statute and so limited that estates come into possession or enjoyment on the death of the creator of the trust.

The distribution of property on death is within the control of the states. Congress has nothing to do with it. *Knowlton* v. *Moore*, 178 U. S. 41, 56. Accordingly one way of testing whether Congress can reasonably include in the net estate of a decedent such trusts as are here under discussion is to inquire whether a state can by statute, without violating the Fourteenth Amendment, subject to the payment of the debts of a decedent property which he had, prior to the statute, transferred to trustees with remainders to take effect at his death.

Take this case: A, in 1905 and when free from debt, transfers property to B as trustee in trust to pay the income to A for life, and, on A's death, to pay the principal to C. C has a vested remainder. The state of A's domicil passes a statute in 1918 making property so held in trust available for the payment of A's debts. There can be no doubt that this supposed statute of 1918 violates the Fourteenth Amendment for it takes property belonging to C, which C owns at A's death as completely as if purchased at that moment from a stranger, to pay A's debts. It cannot be due process of law to take the property of one in

order to pay another's debts. *Hartman* v. *Greenhow*, 102 U. S. 672, 684, and Holmes J. in *Chanler* v. *Kelsey*, 205 U. S. 466, 482.

Naturally there is no direct authority on the point just discussed; but the clear weight of decision is that in the case just put a state cannot, even by a *succession* duty, tax the falling in of C's vested remainder. See *Matter of Pell*, 171 N. Y. 48 and the other decisions referred to by Hand J. in *Frew* v. *Bowers*, 12 F (2d) 625, 629. Whether if Congress had passed a *succession* tax law, *i.e.* a law taxing C on the falling in of his remainder, the Supreme Court of the United States would have followed those state decisions may be arguable. In *Wright* v. *Blakeslee*, 101 U. S. 174 a tax on contingent remainders was sustained.

But Congress in the Estate Tax Law, did not pass a *succession* tax payable (except secondarily) out of the trust property when the vested remainder fell in. It passed a law imposing a tax (primarily) upon the *transfer* by the decedent of his property, a tax payable, just as a debt is payable, by his personal representative out of his estate. For Congress to include in that estate property previously put in trust with vested remainders falling in at the decedent's death and in that way fix the amount and rate of tax payable is approximately the same scheme as if a state should undertake to subject to the payment of a man's debts property he had already put in trust for others. In these respects there cannot be a difference between the Fifth and Fourteenth Amendments. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 410.

THE EFFECT OF THE ACT IF CONSTRUED TO INCLUDE THE TRUSTS UNDER DISCUSSION

It was said in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, that the tax precedes what legatees receive and that inequalities, accordingly, among legatees do not affect the taxing power. But the opinion in that case was concerned with the prospective operation of the Act of 1916 and not with the retroactive features of the Act of 1918.

When, however, the question is whether the retroactive features of the 1918 act are reasonably and naturally adapted to the successful imposition of an estate tax on the net estates of persons dying after its passage, then the effect of those retroactive features is important for the purpose of testing what the act accomplishes.

Suppose in 1905, A possessed of capital and considerable earning power has a mother, wife and children all dependent on him for support. He wishes to care for his mother and fears that his wife, if he dies or goes mad, may not. Accordingly he transfers property to trustees, in trust to pay the income therefrom to

himself as long as he lives and while he is mentally competent, then to his mother for her life, with remainders over. When he creates the trust, he retains sufficient property to take care of his wife and children. Congress enacts the Estates Tax of 1918. What relation has his creation of such a trust to such a tax?

(a) If he dies before the passage of the 1918 Act, there is no Estate Tax.

(b) If he dies subsequent to its enactment, his executor or administrator, according to the government's contention, pays a tax not only on what he leaves but on what he has put in trust for his mother.

(c) If he suffers reverses and leaves nothing, his trustees for his mother pay an Estate Tax on the value of the trust.

(d) Under either (b) or (c) the Estate Tax is based in part or in whole, not on the value of what he transferred in trust in 1905, but on what the value of that trust is when he dies, a value which may be and probably is affected by innumerable human and natural causes.

Congress has said, or so it is assumed for this argument, that the trust he created shall be deemed part of his estate if he survives the act; in other words, that this trust property is a part of what he *transfers* when he dies. If he gives his property to his mother outright, there will be no tax; but if he gives it in trust for his mother for his life, with remainder to her on his death, there will be a tax. If he dies before the passage of the Act there will be no tax. If his executor or administrator has assets for administration, his widow and children in fact pay a tax on his mother's property and, if there are no such assets, his mother and the remainderman in fact pay it. As a matter of fact, he *transfers* when he dies no part of the trust. The tax is in reality not laid on any transfer. It is laid on the form of the trust's limitations, on his survival beyond February 24, 1919, on the success or failure of the administration of his trustees and finally is paid by one or the other objects of his bounty depending on whether he has made a success or failure of his own affairs. What have all these matters reasonably to do with the transfer of the net estate of one who dies after the passage of the Estate Tax Act? Congress is dealing with the disposition of the property of a man who dies in the future; and yet the Estate Tax is determined, not on his situation when he dies, but on a series of events occurring during his life over many of which he has no control and the consequences of which he can, until the law is passed, in no way foresee. Those events are not reasonably related to the transfer of property on his death. If two men create identical trusts of similar property in 1905, with limitations taking effect on their respective deaths, there may be a tax claimed in 1919 from the estate of one who dies in that

year and not from the estate of the other who dies previously or different amounts claimed from their respective estates or from others depending in large measure on no act done by either since the trusts were created. See the discussion in *Knowlton* v. *Moore*, 178 U. S. 41 at pp. 76, 77 and also *Hartman* v. *Greenhow*, 102 U. S. 672, 684.

CAN CONGRESS IMPOSE A WHOLLY RETROACTIVE DUTY, IMPOST OR EXCISE

Can, for example, Congress impose an excise on sales made years previously? If it can, it can practically put out of business any merchant; for the rates of taxation are within the control of Congress and the unsuspecting merchant has laid by no stores for any such rainy day.

It is true that in *Billings* v. *United States*, 232 U. S. 261 at p. 282, the Court says:

> "Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. *Flint* v. *Stone-Tracy Company*, 220 U. S. 107 and authorities there cited."

It is believed that this is the sole decision giving any support to the retroactive features of the Estate Tax; and it is to be borne in mind that the act there in question, enacted August 5, 1909, imposed a tax payable September 1, 1909, on the use of a foreign built yacht. In the *Billings* case, as in the subsequent cases of *United States* v. *Billings*, 232 U. S. 289 and *United States* v. *Bennett*, 232 U. S. 299, there had been a *use* of such a yacht between August 5 and September 1, 1909, and moreover the tax was imposed on a *use* during a year which had not expired. This was a fair way of measuring the tax on the present privilege. Under these circumstances, the guarded statement of the court in the *Billings* case that a tax, "in some respects" retroactive is not unconstitutional is not much authority for the imposition of excises on transactions completed many years before.

The other decisions relied on to sustain retroactive excises are not in point:

Flint v. *Stone-Tracy Co.*, 220 U. S. 107 concerned the corporation income tax of 1909, a tax on the income of a year which had in part expired when the law was passed. The tax was construed, pp. 151, 152, as a tax on the privilege of doing business in that and subsequent years and so lacking the "element of

absolute and unavoidable demand" which, of course, would be the result of a wholly retroactive excise. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, if it can still be considered an authority after income taxes have been held to be direct, is, on its facts, like *Flint* v. *Stone-Tracy Co.*, although the language of the court, by way of *dictum*, goes so far as to take the income of the preceding year as the measure of a tax.

Nor can *Brushaber* v. *Union Pacific Railroad*, 240 U. S. 1, be considered an authority for the validity of a retroactive excise. That case involved the income tax, a kind of tax previously held to have been direct and so to be apportioned according to the census. The Sixteenth Amendment did away with apportionment but did not make the income tax an excise. Accordingly the *Brushaber* case merely stands for the principle that there may be partial retroactive application in a direct tax.

Wright v. *Blakeslee*, 101 U. S. 174 was a tax on the falling in of a contingent remainder after the passage of the taxing act;— a statute of the Civil War which imposed *succession* and not *transfer* taxes.

The case of *Cahen* v. *Brewster*, 203 U. S. 543, was concerned with state *succession* taxes on legatees whose rights were still inchoate because the estate of their testator was still in process of administration.

Apart from authority, what is the pecuniary burden laid on past transactions? It is really a penalty rather than a tax. The ordinary man is shocked at paying in the future for what, when he did it, was free as air. As the power to tax is the power to destroy, the opportunities, if a retroactive excise is legal, for legal and *unavoidable* confiscation are innumerable; and, moreover, the same transaction may be taxed year after year, again and again, without limit in time. *Patton* v. *Brady*, 184 U. S. 608, 619.

DIRECT TAXES

Such being the possible results of retroactive burdens enforced with geographical uniformity throughout the country, we have to consider next whether such burdens are not really direct taxes instead of duties, imposts or excises. As said in *Eisner* v. *Macomber*, 252 U. S. 189, 206, the limitation with respect to direct taxes still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts. Even since *Pollock* v. *Farmers etc. Co.*, 158 U. S. 601, the distinction between the nature of direct and excise taxes is not clear. In the *Pollock* case, the decision turned on the nature of the tax. In *New York Trust Co.* v. *Eisner*, 256 U. S. 345, the court chiefly relied on practical and historical considerations. As pointed out already it is not necessary, practically, for the

has decided that where, by a transfer made before the passage of the act, one who dies in 1920 has created a trust, with estates limited on his death, and has, by the terms of the instrument, lost all control and ownership of the trust property, no part of that trust can be included in the property subject to the Estates Tax. In other words, the Court held that the estates limited on the transferor's life took effect in possession and enjoyment not when he died but when he created the trust. Accordingly there was no "transfer" of any kind on his death. Judge Learned Hand disagreed with the other members of the court on this point of construction. It is our contention that the opinion of the majority can be sustained. The opinion of the Court of Claims appears to be the same. *Arnold* v. *United States* and *Miller* v. *United States*, decided June 14, 1926.

To interpret correctly the statute here in question, it is essential to bear in mind the distinction between an estate tax such as that which the statute imposes and an inheritance or succession tax such as is imposed by the laws of most states.

The Federal Estate Tax law imposes an excise on the privilege of transmitting property by will or intestacy.

> *N. Y. Trust Co.* v. *Eisner*, 256 U. S. 345.
> *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

The tax is on the privilege of transmitting and not upon the privilege of receiving. It is measured with reference to the amount of the estate over which the privilege is exercised, and without any reference whatever to the amount received by a beneficiary.

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49."
> *Y. M. C. A.* v. *Davis*, 264 U. S. 47, per Taft, C. J. at 50.

An estate tax, as distinguished from a succession tax, is determined once for all as of the date of the testator's death. *Edwards* v. *Slocum*, 264 U. S. 61. It does not matter whether or not future interests are created by his will. The measure of the tax is the value of the estate at the time of the decedent's death as defined in the statute, whether he dies intestate, or by will provides for a trust with life estates and vested or contingent

remainders, the value of which can be determined only in the distant future.

On the other hand, the excise imposed by a succession or inheritance tax statute, of which the Massachusetts statute is a typical example, is not imposed on the privilege of transmitting property by will or intestacy, but upon the privilege of beneficiaries to succeed to property. Massachusetts General Laws, chap. 65, sec. 1. See *Attorney General* v. *Stone*, 209 Mass. 186, 190; *Burnham* v. *Treasurer and Receiver General*, 212 Mass. 165, 167.

The nature of inheritance tax statutes (again taking the Massachusetts statute as a fair example) is further emphasized by the fact that the tax is graduated not with reference to the value of the estate disposed of by the decedent but with reference to the value of the interest received by the beneficiary. Massachusetts General Laws, chap. 65, sec. 1.

Interpreting the Revenue Act of 1918 with reference to the commodity upon which it imposes an excise it is clear that the words "intended to take effect in possession or enjoyment" have to do only with the taking effect of the original transfer as a whole. See *Fidelity etc. Company* v. *Lucas*, 7 F. (2d) 146. From that point of view the trust takes effect in possession and enjoyment when the settlor divests himself of possession and enjoyment. Where a decedent divests himself of both possession and enjoyment prior to the passage of the Estate Tax law, no commodity remains in him upon which the excise can be imposed. It is immaterial when or in what order pursuant to the terms of the trust the usufruct is enjoyed by its beneficiaries, since the usufruct presents not the commodity of transmission but the commodity of succession upon which no excise is imposed by the Revenue Act of 1918.

The words "created a trust . . . intended to take effect in possession or enjoyment at or after his death" are those commonly used in succession tax statutes, where they aptly describe the subject matter of the tax, *viz.*, the succession. They are undoubtedly intended, in such statutes, to apply to the ordinary trust with life and remainder interests. Congress, perhaps, adopted these words, with reference to past transactions, without realizing their complete inappropriateness in a statute which taxes not successions but transfers. Either it must be supposed that Congress used these words inadvertently, or that they were intended to apply to instances, conceivable, though rare, of trusts when the creation of the trust itself, as distinguished from the succession to the remainder interests, was intended to take effect in possession or enjoyment after the death of the creator of the trust. In either event, the use of these words cannot justify an interpretation inconsistent with

the basic language of the Estate Tax of 1918, *viz.:* a tax on the transfer of the net estate of one who dies after its passage.

Respectfully submitted,

ARTHUR D. HILL,
RICHARD H. WISWALL.